IN THE

SUPREME COURT OF THE UNITED STATES.

METCALF BROTHERS & COMPANY, Petitioners,	
AGAINST	October Term 1901.
BENJAMIN BARKER, JR., Trustee in Bankruptcy of LESSER BROTHERS, Respondent.	No. 269.

Brief for Petitioners in reply to Brief for Respondents.

The respondent's counsel, in their statement of the facts, have omitted to follow the certificate of the Circuit Court of Appeals and have made their own statement. Their argument is thus in part based upon a record not before this Court, and which, we may add, does not in fact exist. The statements of fact alleged by them, which do not appear in the record, are not very material, and it seems sufficient at this time to point out the fact and to refer the Court to the certificate for the facts to be considered.

Among other things, they have quoted throughout their brief the opinion of the Circuit Court of Appeals as an authority. This opinion, however has been withdrawn by that Court. (See 108 Fed. Rep., p. 202, note.) Although it does not appear in the record, it is true that the Circuit Court of Appeals at first decided the petition against the petitioners, but upon a petition showing error a reargument was granted and had. That Court has not yet decided the matter upon the reargument, but, to enable it to do so, has certified to this

Court certain questions specified in the certificate. The opinion first rendered by it was withdrawn and, in consequence, no reference was made to it in the brief for the petitioners. Although, in our judgment, the opinion was exceedingly vulnerable, it seemed unnecessary to combat propositions no longer advanced. The statement of procedure appearing on p. 6 of the brief for the respondent is erroneous.

To such portions of the brief for the respondent as we have any suggestions to make, we will reply in the order in which they are there presented.

I.—*The first question certified is in proper form.*

It raises a single question of law.

In *McHenry* v. *Alford*, 168 U. S., 651, cited by the respondent's counsel as authority to the contrary, the question was whether the Circuit Court had jurisdiction "to hear and decide said case." This Court says (p. 659): "Neither party (so far as appears from the "record) raised any question of jurisdiction in the "Circuit Court to hear and determine the whole case." After referring to a number of possible objections to the jurisdiction which might have been made, the opinion continues: "We should not be asked to grope our "way through the papers submitted and examine every "objection that imagination could raise, with no hint "as to what, if any, objection is really supposed to ex-"ist." For these reasons the Court refused to answer the question.

Here the facts upon which jurisdiction was assumed and the objection to the jurisdiction, originally made in the District Court, are explicitly stated in the certificate (pp. 3, 4).

The question can be distinctly answered without regard to the other issues of law; it is not a question of fact or of mixed law and fact, and does not involve any conclusion or judgment upon the weight or effect of testimony or facts adduced; and it does not and could not embrace the whole case.

It is the same question which was answered in the following cases:

Bardes v. *First National Bank of Hawarden*, 178 N. Y., 524, 526:

"3d. Can this Court, being the District Court for the "Northern District of Iowa, take jurisdiction over the "suit as it now stands on the record?"

White v. *Schloerb*, 178 N. Y., 542, 545:

"First. Whether the District Court sitting in bank-"ruptcy had jurisdiction by summary proceedings to "compel the return of the property seized."

Wall v. *Cox*, 181 U. S., 244, 246:

"First. Under the facts and the pleadings above "stated, had the District Court of the United States for "the Western District of North Carolina jurisdiction "over the controversy?"

In this case the Court say: "The statement certified "distinctly shows that the defendants, specially appear-"ing for the purpose, protested that the District Court "had no jurisdiction to entertain this bill, or to de-"termine the question arising between the trustee and "the defendants, and that the defendants did not con-"sent to the jurisdiction of the Court. The answer to "the first question certified must therefore be that the "District Court had no jurisdiction of the case."

II.—*The nature of the rights obtained by a judgment creditor by filing a creditors' bill.*

Under this caption the respondent's counsel discuss at some length, and with much ability, a number of propositions of law which are not, as we conceive it, involved in the consideration of the questions certified. We will, however, follow their argument.

As we read their statement of law as to priorities of creditors, it is capable of conveying an inaccurate impression, though not, of course, so intended. The law as to priorities, we submit, is as follows:

A creditor's right to priority varies with his process

and the kind of property affected. Such property is either (*a*) property subject to levy and sale under an execution, or (*b*) property not so subject. The first kind is termed legal assets of the debtor, the second, equitable.

(*a*) Property subject to levy and sale under an execution.

This is either real property or personal property capable of manual delivery. On real property a creditor obtains a lien by the entry of a judgment; on tangible personal property by the delivery of an execution to the Sheriff (not, as the respondent's counsel state, through the levy by the Sheriff). Such real or personal property affected by an apparent transfer may be treated by the judgment creditor in two ways: He may either (1) sell it through the agency of an execution and defend the judgment debtor's title in an action brought against him by the claimant thereto; or (2) he may have the claimant's title adjudged invalid in an action brought for the purpose prior to a sale. In the latter case the sale may be either under an execution or by a receiver appointed for the purpose.

Whichever method the creditor may pursue, the priorities are the same, unless a receiver be appointed. If a receiver be appointed, his title, and the title of any subsequent purchaser, is coincident with the date of his appointment, or, technically, the involuntary conveyance of the property to him by the judgment debtor which the Court decrees. The creditor has elected to abandon the lien of his judgment or execution, as the case may be, and to rely on the later title of the receiver. A receiver's title, then, in an action affecting legal assets, is subject to any prior lien by judgment or execution outstanding in favor of any other creditor.

Considering, first, the case of real estate, the result is this: A judgment creditor's action simply removes the cloud on the title and the judgments affecting it are satisfied in the order of their priority. This is the situation in the case at bar as to the real property conveyed to Lilianthal. No receiver was appointed by the

Court. If a receiver had been appointed, the result would have been to postpone the plaintiff's lien to all other judgments against the Lessers.

Chautauque County Bank v. *Risley*, 19 N. Y., 369.

White's Bk. of Buffalo et al. v. *Farthing et al.*, 101 N. Y., 344.

As to personal property capable of manual delivery, the result is the same with this modification. The lien on personal property arises from the delivery of the execution to the Sheriff. If the execution is returned or abates, the lien ceases. If the creditor's action be brought in aid of an execution issued by him, his priority is similar to that in the case of real estate, and is governed by the executions outstanding at the time of judgment. If his action be brought after the return of an execution unsatisfied, his priority is subject to any earlier executions outstanding or satisfied through a sale of the property affected. If at the time of judgment in the creditor's action there be no outstanding execution or there has been no sale under a prior execution, the judgment creditor may pursue the property either through a new execution or a receiver and obtain priority of payment.

Storm v. *Waddell*, 2 Sand., Ch. 494.

Becker v. *Torrance*, 31 N. Y., 631.

First National Bank v. *Shuler*, 153 N. Y., 163, 172.

The case at bar is not governed by these propositions of law, as none of the personal property involved was legal assets, so called.

(*b*) Property not subject to levy and sale under an execution.

As to all such property, termed equitable assets, the judgment creditor first commencing an action to subject it to the payment of his judgment obtains, by the com-

mencement of the suit, a lien upon it and is entitled to priority of payment.

This lien is like the lien of a judgment on real property or the lien of an execution on personal property subject to an execution. It does not depend on a receivership, although a receiver is sometimes appointed. Such a receiver is for the purpose of preserving the property from loss and not for the purpose of establishing any title. In an action affecting legal assets, a receiver is a matter of right; in one affecting equitable assets it is a matter of discretion. In the latter case a receiver will be appointed, as the Court say in *Bloodgood v. Clark*, 4 Paige, 574, "provided the complainant can "satisfy the Court that he has an equitable claim to the "property in controversy and that a receiver is necessary to preserve the same from loss."

The lien is not extinguished by the death of the judgment debtor, but survives against his equitable assets in the hands of his administrator.

Brown v. *Nichols*, 42 N. Y., 26.
First National Bank v. *Shuler*, 153 N. Y., 163, 171.
Reynolds v. *Aetna Life Ins. Co.*, 160 N. Y., 635, 648.

In *Brown* v. *Nichols*, the same argument was made, which the respondent's counsel now make. It was urged that the lien is merely an equitable lien which could become effective only on the appointment of a receiver, and, as a receiver had not been appointed, it would not be allowed to prevail over a legal right, such as the appointment of an administrator who must distribute the assets of the intestate according to a prescribed rule of law (see dissenting opinion of Ingalls, J., p. 34). But the Court (including Grover, dissenting, on another point, see pp. 42, 43) decided otherwise. They say (p. 30): "Aside from the effect the Revised Statutes "may have upon the subject, it will not be questioned "that the lien the judgment creditor gets by virtue of "the commencement of his equitable suit would sur-

" vive the death of the debtor. (*Storm* v. *Waddell*, 2 " Sand., Ch., 494.) The property then passes to the " personal representatives charged with this lien. The " assets are subject to this lien, and the debts of the " debtor are to be paid out of them after this lien, *like* " *any other legal lien*, has been first satisfied."

The same doctrine is repeated in the later cases cited.

These authorities, irrespective of those cited on our principal brief, we submit, dispose of the contention of the respondent's counsel (Brief p. 15) that the lien " is not protected against such transfers of title *in invitum* as may in the meantime be imposed by the paramount act of Congress in establishing a uniform system of bankruptcy." There is no difference in this respect between the right of a trustee in bankruptcy and the right of an administrator, the title of each of whom arises only by operation of law. It is to be borne in mind, moreover, that a trustee in bankruptcy stands in the shoes of the bankrupt and takes only his title.

The contention of the respondent's counsel that an effective lien depends in some way upon a present transfer of part of the debtor's property out of himself, either voluntarily or by a forcible dispossession, is erroneous.

The lien of a judgment on real estate (which exists without an execution), no more lessens the estate of the debtor than the lien or *lis pendens* of a creditor's action. (*Conrad* v. *The Atlantic Insurance Company*, 1 Peters, 386, 443.)

The lien of an execution on personal property does not, as counsel state (Brief, p. 14), depend on a *levy* by the Sheriff, or any forcible taking away of property. It comes into existence by its delivery to the Sheriff.

New York Code of Civil Procedure, §1405: " The goods and chattels of a judgment creditor * * * are * * * bound by the execution, from the time of the delivery thereof to the proper officer."

Hathaway v. *Howell*, 54 N. Y., 97.

Indeed, at common law, goods were bound from the teste of the writ and the alteration of this rule comes

through statute (see *ex parte Foster*, 2 Story, 131, 151).

The same is true of the lien of a writ of attachment.

There is no difference between these liens established by operation of law, *in invitum*, and one established voluntarily, as by mortgage or pledge. Every one of them requires a further proceeding to make it effective. A mortgage requires a foreclosure action to establish the lien and the mortgagee's right. A judgment on real estate requires a sale under an execution. An execution on personal property requires a levy and sale. The lien of a creditor's action requires a judgment. But none of them are any the less valid and effective liens.

None of the personal property affected by the case at bar is subject to a levy and sale under an execution, or is legal assets. None of it could be reached except through a creditor's action. The lien is therefore not dependent upon a receiver, nor can it be superseded in any way. It arises with the commencement of the action and exists independent of any receivership.

In their argument the respondent's counsel seem to confound the effect of a receivership in a creditor's action affecting legal assets and in one affecting equitable assets. In the first, a receivership is necessary to prevent a subsequent levy and the property is even then subject to the lien of any prior executions. In the second, it is unnecessary, is a convenience merely, and adds nothing to the creditor's security.

Kitchen v. *Lowery*, 127 N. Y., 53, 60.
Matter of Clover, 8 App. Div., 556, 558; aff'd 154 N. Y., 443.

As to equitable assets the lien established by the commencement of the action is perfect in itself.

A judgment note or a confession of judgment, not utilized by the creditor, to which the respondent's counsel liken the lien obtained in a creditor's action (Brief, pp. 17, 18), is not a lien at all. At most these instruments are merely agreements for liens. They are nowhere recognized by the law as liens.

The alleged inchoate quality of the lien obtained in

a judgment creditor's action has already been discussed by us in our principal brief. To the other authorities cited, we may add the characterization of the action contained in *Fidelity Insurance Co.* v. *Huntington*, 117 U. S., 280: "The suit as brought by Huntington is a "creditor's bill to subject incumbered property to the "payment of his judgment by a sale and distribution "of the proceeds among the lien holders according to "their respective priorities. *There is but a single "cause of action, and that is the equitable execution of "a judgment against the property of the judgment "debtor.* This cause of action is not divisible."

The commencement of the equitable action—the equitable execution—is like the delivery to the sheriff of the legal writ; by each act a lien is created. The analogy is precise and the one can be no more successfully assailed than the other.

III.—*All the property affected by the creditor's suit, except the real estate, was equitable assets.*

No question as to this was raised by the District Court or the Circuit Court of Appeals. No argument on the point was therefore presented in our principal brief.

Whether assets are legal or equitable, so as to be subject to the lien of a creditor's action, is determined by ascertaining whether they are or are not subject to levy and sale under an execution. It is plain that none of the assets in question were so subject and they are therefore clearly equitable.

The property, as appears from the certificate (Record, pp. 1, 2), was as follows:

1. Outstanding accounts of Lesser Brothers transferred to Marcus A. Adler and others. Choses in action are not and never have been subject to levy and sale under an execution.

2. Money in the hands of receivers appointed by the Supreme Court of New York. Property in the custody of the Court is not and never has been subject to an execution.

Moreover, all the property which was originally mer-

chandise has been converted into equitable assets by a sale under an order of the Supreme Court of New York. The proceeds of that sale are held by the receivers.

The bankrupts confessed certain judgments in favor of certain favored creditors. Under executions issued on these confessed judgments, the Sheriff took possession of certain merchandise belonging to the bankrupts, being clothing, material and stock in trade. A receiver of the bankrupts' partnership property was then collusively appointed. This receiver, certain replevin creditors, the confessed judgment creditors, and subsequent judgment creditors, all claimed the merchandise. Thereupon the Court took possession of the property, appointed new receivers to take possession of it, ordered the merchandise sold and the proceeds to be held by the receivers subject to the further order of the Court. This order was made November 23, 1896. The goods were sold by the receivers pursuant to the order, and the receivers now hold the proceeds. They have been directed by the Supreme Court to pay a part of such proceeds to the petitioners in satisfaction of their judgments. (Record, p. 2, fol. 3.)

The petitioner's equity action was begun December 17, 1896. There was not at that time, nor had there been since November 23, 1896, at least, when the property was taken into the custody of the Court, any property upon which an execution could be levied. And even if the property had not been in the custody of the Court, inasmuch as it had been sold and its identity lost, it ceased to be legal and became equitable assets.

Lawrence v. *Bank of the Republic*, 35 N. Y., 320. In this case the bank sought to levy by attachment on the proceeds of a sale of its debtor's property made by his assignee for the benefit of creditors. The Court held that the assets were equitable and not legal. They say: "The case is, however, different, when the assigned "property has been sold by the assignees, and its iden- "tity gone. The proceeds cannot be attached or levied "upon by the Sheriff as the debtor's property. Setting "aside the assignment simply, would not vest the title

" to such proceeds in the debtors. The only remedy of " the creditor, in such a case, is for him to institute a " creditor's suit."

In *Thurber* v. *Blanck*, 50 N. Y., 80, 86, 87, the Court affirm this ruling, saying: " I think this case falls with- " in the principle decided in *Lawrence* v. *The Bank of* " *the Republic*. There the property had been converted " into money, requiring an equitable action to reach."

In *Braem et al.* v. *M. N. Bank*, 127 N. Y., 508, the Court say (p. 516): " And while remedies at law, " either affirmative or defensive, may be supported in " behalf of the judgment creditor having a lien upon, " or a purchaser on execution sale of tangible personal " property transferred by the judgment debtor in fraud " of his creditors before the levy, the same rule is not " applicable to the proceeds received by the fraudulent " vendee on sale by him of the property. They, for " the pursuit of the creditor, are the subject of equitable " jurisdiction only."

The respondent's counsel travel much outside the record in their classification of the property for the purpose of arguing this point. But conceding the situation as they state it, the facts plainly show that the assets affected by the action are equitable. (Brief, pp. 32-35.)

In Classes 1 and *3a*, the existence of such accounts and goods does not appear in the record. Of course, if they are not affected by the action, no further discussion is needed. Similarly the real property, Class 2, is not, as counsel state, involved in this proceeding.

Class *3b* we have already discussed. The statement as to Class 4—the accounts—is erroneous, as, although the Appellate Division did dismiss the action as to Adler, one of the transferees of the accounts, the Court of Appeals reversed the action of the Appellate Division and restored the judgment of the Special Term. (Record, p. 3, fols. 6, 7.) The accounts were therefore

directly involved in and subject to the lien of the creditor's action. Even the respondent's counsel do not claim that choses in action are not equitable assets.

IV.—The remaining points discussed by the respondent's counsel are covered by our consideration of them in the principal brief.

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